



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. **78-1216**

BRITISH AIRWAYS BOARD,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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British Airways Board¹ prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 8, 1978.

Opinions Below

The opinion of the Court of Appeals is reported at 585 F.2d 946 (9th Cir. 1978) and is printed in the Appendix to this Petition at 1a.

The order of the district court, granting summary judgment dismissing the negligence, strict tort liability and breach of warranty complaint in this products liability action is not reported, either officially or unofficially. Neither is the order of the district court denying reconsideration. They are printed in the Appendix at 16a and 18a, respectively.

¹ Hereinafter referred to either as Petitioner or British Airways.

Jurisdiction

The judgment of the Court of Appeals was entered on November 8, 1978. 585 F.2d 946 (9th Cir. 1978); Appendix 1a. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

This case involves a negligence, strict tort liability and breach of warranty action brought by Petitioner against Respondent, The Boeing Company,² to recover damages for the loss of a Boeing 707 jet aircraft which crashed on March 5, 1966 in Japan.

After completion of certain preliminary and limited discovery proceedings, British Airways moved for partial summary judgment on the issue of liability with respect only to the strict tort liability claim asserted in the complaint. In opposing the motion, Boeing filed a cross-motion for summary judgment dismissing the complaint in its entirety and argued, upon the basis of certain uncompleted and ongoing discovery proceedings, that the aircraft was not defective, either in design or manufacture and that the accident, in any event, was not caused by any fault on the part of Boeing.

Extensive documentary evidence, depositions and briefs were filed both by British Airways and Boeing in support of their respective summary judgment motions and in opposition to the other's motion.³ At the time of oral

² Hereinafter referred to as Boeing.

³ The motion papers and supporting memoranda of law, summarizing the evidence on the liability issues before the district court when the motions were heard and decided, are printed in full in the Appendix commencing at 40a.

argument before the district court on these motions, discovery as to liability and causation was incomplete and the court was so advised by counsel for British Airways.⁴

With the case in this posture, the district court made critical findings of fact as to the defective nature of the aircraft and causation, denied British Airways' motion for partial summary judgment, granted Boeing's motion and dismissed the entire complaint. The Court of Appeals affirmed.

Therefore, the questions presented for review are:

1. Whether summary judgment dismissing a negligence, strict tort liability and breach of warranty action is properly granted where the court decides disputed issues of material fact as to the defective nature of the product and causation?

2. Whether summary judgment dismissing a negligence, strict tort liability and breach of warranty action is appropriate where discovery proceedings on the liability issues are incomplete and substantial evidence of same is peculiarly within the knowledge and possession of the party seeking summary judgment?

3. Whether summary judgment dismissing an action is proper where the district court is aware, at the time the motion is considered, that critical discovery on the liability issues is incomplete although no technical affidavit is filed pursuant to Rule 56(f) of the Federal Rules of Civil Procedure?

4. Whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affi-

⁴ Appendix 22a-39a.

davits, showed that there was no genuine issue as to any material fact on the issue of liability and that Boeing was entitled to judgment as a matter of law dismissing the negligence, strict tort liability and breach of warranty action?

Statutory Provisions

Federal Rule of Civil Procedure 56

Summary Judgment

....

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FED. R. CIV. P. 56(c).

....

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depo-

sitions to be taken or discovery to be had or may make such other order as is just.

FED. R. CIV. P. 56(f).

Statement of the Case

A. The Facts.

On March 5, 1966, while on a regularly scheduled passenger flight from Tokyo to Hong Kong, a Boeing 707 jet aircraft, owned and operated by British Airways, broke up in flight and crashed in several pieces in the vicinity of Mount Fujiyama, Japan. All passengers and crew members on board were killed in the crash.

Following the accident, British Airways and Boeing agreed to defer the bringing of any action for damages for the loss of the aircraft or its use, until after the last passenger, crew or property damage claim had finally been resolved and further agreed to forego any discovery, *inter sese*, in litigation involving any such claims, except for purely defensive purposes. This action, therefore, was not commenced until 1973. The complaint seeks damages for the loss of the aircraft and consequential damages including loss of use. Liability in the complaint is alleged upon the basis of negligent design and manufacture of the Boeing 707 jet aircraft, strict tort liability and breach of express and implied warranty.

The action originally was commenced in the Southern District of New York. A protective action subsequently was commenced in the Central District of California in view of the assertion by Boeing of a statute of limitations defense in the New York action.

Prior to answer in the California action, Boeing moved for an order transferring the action to the Western District of Washington pursuant to 28 U.S.C. §1404. This motion was granted in April, 1974. The New York action also was ordered transferred to the Western District of Washington pursuant to 28 U.S.C. §1404 in May, 1974.

B. Proceedings in the Courts Below.

1. The District Court.

British Airways initiated discovery proceedings in the district court by addressing written interrogatories to Boeing in September, 1974. The answers of Boeing were received in March, 1975.

At a preliminary pre-trial conference in November, 1974, Boeing requested the district court to postpone until January, 1975 the deposition of a former Boeing employee, Morgan, who had been subpoenaed by British Airways. This request was granted. Also at this conference, British Airways and Boeing indicated that liability discovery could be completed within a year and, accordingly, a second pre-trial conference was scheduled for September, 1975.

The Morgan deposition commenced in January, 1975. Morgan refused to answer numerous questions concerning his testimony in prior litigation, given while he was employed by Boeing, involving a similar crash of the military version of the 707 aircraft known as the KC-135 jet aircraft. The deposition was adjourned and British Airways moved for an order compelling Morgan to read his prior testimony and answer questions relating to same. The motion was heard by the district court in April, 1975 but was never decided.

At a conference before the district court in April, 1975, counsel for Boeing advised that Boeing was interested in considering further the settlement of the case and requested that all discovery, including the resumption of the interrupted Morgan deposition, be stayed pending settlement evaluation of the case by Boeing. In view of this, British Airways and Boeing, with the approval of the district court, agreed to stay all aspects of the litigation until July, 1975. In July, Boeing advised that it had not yet completed its settlement evaluation and the stay of discovery was continued by agreement until August, 1975.

At a pre-trial conference on September 29, 1975, Boeing advised that no settlement offer would be made. A trial date of November 8, 1976 was then set by the district court with discovery to be completed in advance of that date. Thereafter, a schedule for the depositions of Boeing and British Airways personnel was agreed upon among counsel. The depositions of British Airways personnel were scheduled first, to commence in London in July, 1976. The depositions of Boeing personnel were to follow.

In May, 1976, British Airways moved for partial summary judgment on the issue of liability but only with respect to the strict tort liability claim. The motion was based upon certain documentary evidence and testimony of Boeing personnel in the related passenger and crew litigation arising out of the accident. British Airways argued that this evidence established that the fin terminal attachment fitting⁵ of the aircraft was defectively designed and manufactured and that this was the proximate cause of the accident. British Airways also argued that the admitted cracks in the fin terminal attachment fitting were due to design and manufacturing defects and that this

⁵ The part which holds the tail (the vertical stabilizer or fin) to the fuselage of the aircraft.

caused the tail of the aircraft to separate in flight, resulting in the accident. Appendix 47a-48a.

By agreement among counsel, Boeing responded to the motion in August 1976 after some of the previously scheduled depositions of former and present British Airways personnel had been taken in London in July, 1976. In opposing the motion, Boeing cross-moved for summary judgment dismissing the entire complaint. Boeing argued that there was no design or manufacturing defect and that the accident was due to the abnormally severe turbulence encountered which subjected the aircraft to stresses beyond its design limits. Appendix 273a. Boeing also argued that the aircraft encountered this turbulence because of the negligence of the pilot in flying at a dangerously low altitude in the vicinity of Mount Fujiyama. Appendix 281a.

On September 1, 1976, British Airways requested the district court to adjourn the trial date to November 8, 1977 in order to permit the continuation and completion of all outstanding and contemplated discovery. Boeing refused to join in this request and the request was never passed upon by the district court in view of the subsequent granting of summary judgment dismissing the action.

Oral argument on the summary judgment motions was heard by the district court on September 10, 1976. At this time the following scheduled discovery items were outstanding and not yet completed:

1. The interrupted Morgan deposition.
2. The previously scheduled depositions of Boeing personnel which had not yet even commenced.
3. British Airways' petition for Letters Rogatory and a Commission to take depositions in Japan of

witnesses to the crash and investigators of the Japanese Government.

4. British Airways' further request for the production of Boeing documents.

5. The completion of depositions of certain present and former personnel of British Airways not available during the previous London depositions.

On this state of the record, the district court, on September 23, 1976 granted the Boeing motion for summary judgment dismissing the action as to all claims. In its ORDER ON SUMMARY JUDGMENT MOTIONS, the district court erroneously stated that the "parties agree that there are no material facts in dispute". On this erroneous assumption, the court then proceeded to find and conclude:

1. The probable cause of the accident in question was abnormally severe Clear Air Turbulence which imposed excessive loads on the aircraft beyond its design limits.

2. Although there is undisputed evidence of some fatigue failure in the fin attachment fittings on this aircraft, as well as on other Boeing 707 aircraft, which does not meet acceptable design standards, there is no evidence indicating that the crash resulted from, or was caused, in whole or in part, by such failure. Instead, the evidence supports the finding of the Japanese Civil Aeronautics Board accepted by the responsible officers of the plaintiff, as well as the defendant, that cracks in the fin fittings were not an accident cause factor.

3. Plaintiff has been unable to produce any evidence that a contributing cause of the accident was a defect in the aircraft.

Appendix 16a-17a.

A motion for reconsideration was denied. The district court rejected Petitioner's argument that summary judgment dismissing the complaint was improper due to the ongoing and uncompleted depositions and discovery proceedings, stating that British Airways had initiated the "process of judicial review" by filing its motion for partial summary judgment. Appendix 19a.

2. *The Court of Appeals.*

The Court of Appeals affirmed the decision of the district court. While recognizing that British Airways and Boeing had different theories as to the cause of the accident, the Court of Appeals nevertheless accepted entirely the Boeing theory that the accident was caused by severe clear air turbulence which subjected the aircraft to stresses beyond its design strength. Appendix 6a-12a; 585 F.2d at 951-4.

The court below held that British Airways had failed to meet the burden of presenting specific facts showing that a contradiction of the evidence (relied upon by Boeing in support of its theory as to causation) was possible. Appendix 6a-9a; 585 F.2d at 951-2. The opinion of the Court of Appeals discloses an initial acceptance of the Boeing theory of the accident and a recognition only of that evidence which would support the Boeing theory and preclude any conflict requiring a trial by jury. Appendix 6a-12a; 585 F.2d at 951-4.

The Court of Appeals also rejected the argument of British Airways that summary judgment was clearly in-

appropriate in view of the uncompleted discovery proceedings. Appendix 12a-15a; 585 F.2d at 954-5. This appears to have been based upon the erroneous conclusion by the Court of Appeals that British Airways raised the argument with respect to the uncompleted discovery proceedings for the first time on appeal. Appendix 13a; 585 F.2d at 954. Such is not the case. The district court was fully aware at the time that the motions for summary judgment were argued that substantial and significant discovery proceedings were not yet completed and were pending. In fact, British Airways had asked for an adjournment of the trial date for one year so that the discovery proceedings could be completed and this request was made to the district court before the oral argument on the summary judgment motions. Additionally, it was clear from remarks by counsel for British Airways that the Boeing motion was premature due to the uncompleted state of discovery proceedings on the issue of liability. Appendix 36a-38a.

In summary, the Court of Appeals held that British Airways had not presented any evidence "on which the trier of fact could legally support its theory of the case" and rejected the argument of British Airways that summary judgment should not have been granted while discovery proceedings were pending with respect to the very liability issues decided by the district court.

The combined effect of the decisions of the courts below is that the very discovery proceedings which would have developed the evidence to rebut the Boeing theory of the accident, which evidence was peculiarly within the possession and knowledge of Boeing and non-parties, have been truncated. Upon the basis of an incomplete discovery record, the district court, affirmed by the Court of Appeals, has assumed the role of trier of the fact and has resolved the issues of liability in favor of Boeing.

Reasons for Granting the Writ

This case raises important questions concerning the proper application of the summary judgment rule⁶ in a products liability case in view of the severity of the summary judgment remedy which, if misapplied, wrongfully deprives a litigant of the right to a trial. The courts below have usurped the jury function and effectively have denied British Airways of its right to trial by jury upon the basis of a full and complete record following the completion of discovery proceedings.

In granting summary judgment dismissing the action, the courts below have made findings of ultimate fact as to the liability issues in this case, in the face of conflicting theories and evidence as to the existence of a defect in the aircraft and causation.

Even if the evidence before the district court had not demonstrated a genuine issue of material fact on the issues of liability, the pending discovery proceedings should have been completed before the summary judgment motion of Boeing was considered, particularly since the critical evidence concerning the defective design of the aircraft and causation was within the peculiar knowledge and possession of Boeing, the party seeking summary judgment. In the face of clear evidence before the district court that substantial discovery proceedings were scheduled and incomplete, the technical absence of an affidavit as envisaged by Rule 56(f) does not warrant the district court granting summary judgment dismissing the action.

The action was not dismissed upon any recognizable or proper legal ground. The action was dismissed because

the district court, affirmed by the Court of Appeals, made findings and conclusions of ultimate fact concerning the cause of the accident. Discovery on the very issues of liability before the district court was cut off in the middle of the proceedings. British Airways effectively was denied access to the evidence which would have served to establish triable issues of fact as to causation and liability for this accident. This evidence not only was within the peculiar knowledge and possession of Boeing, the party seeking summary judgment, but also was within the knowledge and possession of non-party witnesses. The district court was fully aware of the uncompleted discovery proceedings initiated by British Airways which were pending at the time summary judgment was granted dismissing the action. The courts below simply accepted Boeing's theory of the case and interpreted all of the evidence available to support that theory.

The courts below have usurped the function of the jury in making findings of fact as to the issues of liability and causation. Petitioner, British Airways, has been denied its right to trial by jury in this case. Moreover, petitioner has been denied any opportunity to develop and demonstrate, through the discovery processes, that there are indeed triable issues of fact as to liability and causation in this case.

The granting of summary judgment by the district court and affirmance by the Court of Appeals constitute a clear case of improper application of the summary judgment rule as enunciated by the Court. Certiorari should be granted in order to correct this misapplication of the severe summary judgment remedy by the courts below.

⁶ FED. R. CIV. P. 56.

1. The courts below misapplied the summary judgment rule in deciding disputed issues of fact concerning liability and causation rather than limiting their function to the determination that there were genuine issues requiring a trial.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

In *Sartor v. Askansas Natural Gas Corp.*, 321 U.S. 620 (1944), the Court enunciated the principles to be applied in ruling on a motion for summary judgment:

... Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.

321 U.S. at 627. See also, *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 468 (1962).

The district court has no authority to grant summary judgment when the standards set forth in Rule 56(c) have not clearly been met and a motion for summary judgment must be denied if there exists a triable issue of material fact. *Fountain v. Filson*, 336 U.S. 681 (1949); see also, *Carter v. Stanton*, 405 U.S. 669 (1972).

All that is required for a material fact to be in dispute is that sufficient evidence supporting the claimed factual dispute be shown so as to require a jury to resolve the parties' differing versions of the truth at a trial. *First National Bank v. Cities Services Co.*, 391 U.S. 253, 289 (1968).

It is not the function of the court on a motion for summary judgment to decide disputed issues of fact. *Soria v. Oxnard School District Board of Trustees*, 488 F.2d 579 (9th Cir. 1973), cert. denied, 416 U.S. 951 (1974); *United States v. Bissett-Berman Corp.*, 481 F.2d 764 (9th Cir. 1973); *Vickery v. Fisher Governor Co.*, 417 F.2d 466 (9th Cir. 1969).

A court may not grant summary judgment merely because the facts offered by the moving party in support of the motion are more plausible than those offered by the party opposing the motion, or because the court believes that the moving party is more likely to prevail at trial. *Rodway v. United States Department of Agriculture*, 482 F.2d 722 (D.C. Cir. 1973); *Harris v. Pate*, 440 F.2d 315 (7th Cir. 1971); *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272 (2d Cir. 1967).

The district court exceeded its proper function by deciding the disputed issues of material fact as to liability and causation. Where there exist factual issues relating to liability and causation, summary judgment is particularly inappropriate. *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973).

The district court found that "the probable cause of the accident in question was abnormally severe Clear Air Turbulence which imposed excessive loads on the aircraft beyond its design limits." Appendix 16a. This factual finding was made in spite of the fact that the court recognized that "there is undisputed evidence of some fatigue failures in the fin attachment fittings on this aircraft . . . which does not meet acceptable design standards." Appendix 16a. (Emphasis added). However, the district court disregarded this evidence because, after weighing

all of the evidence presented, the court concluded that "the evidence supports the finding . . . that cracks in the fin fittings were not an accident cause factor." Appendix 17a.

The basic error of the district court, therefore, was in proceeding to *decide* the factual issues relating to liability and causation rather than limiting itself to the determination that there were genuine issues of material fact to be resolved at trial.

2. Even the incomplete discovery record before the district court disclosed that there were genuine issues of material fact precluding the granting of summary judgment dismissing the action.

The following genuine issues of material fact were disclosed by the affidavits, depositions and other documentary evidence presented by British Airways and Boeing in connection with the summary judgment motions:

1. Whether the aircraft had inherent design or manufacturing defects when it was sold to British Airways by Boeing.
2. Whether the fin terminal attachment fittings of the aircraft were defectively designed or manufactured.
3. Whether the fin terminal attachment fittings were adequate to hold the vertical fin to the aircraft or were underdesigned.
4. Whether the admitted fatigue cracks in the fin terminal attachment fittings caused the accident or contributed thereto.

5. Whether abnormally severe clear air turbulence existed near Mt. Fuji at the time of the disintegration of the aircraft.

6. Whether any existing severe clear air turbulence exceeded the design strength of the aircraft, thereby causing or contributing to the crash.

7. Whether the design strength of the aircraft was adequate to withstand the turbulence encountered, if any.

8. Whether the crack in the fin terminal attachment fitting was a proximate cause of the crash.

Appendix 46a-122a; 273a-311a.

Post-accident tests conducted by Boeing itself showed conclusively that the right rear fin terminal attachment fitting of the aircraft was 40% below the designed ultimate safety factor.⁷ Appendix 76a. Further, James A. Ramsey, a Boeing employee, testified on deposition that this design defect existed in the aircraft as originally manufactured and delivered to British Airways. Appendix 69a.

The limited deposition testimony of Richard M. Morgan, a former Boeing employee, established that a crack in the fin terminal attachment fitting can lead to catastrophic failure of the aircraft. Appendix 59a-60a.

The district court was compelled to admit, based upon the documentary evidence presented, that there was undisputed evidence that the fin attachment fittings of the aircraft were structurally defective and underdesigned. However, in spite of the persuasive and substantial evi-

⁷ In spite of this finding, Boeing concluded that these cracks were not an accident cause factor. This self-serving conclusion was relied upon by both the district court and the Court of Appeals in granting summary judgment to Boeing.

dence in the record supporting petitioner's allegations of causation and in direct contravention of those principles which govern the remedy of summary judgment, the district court *found* that "the evidence supports the finding . . . that cracks in the fin fittings were not an accident cause factor." Appendix 16a-17a.

The district court further *found*, accepting Boeing's theory of causation, that the probable cause of the accident was clear air turbulence of unprecedented severity which caused the aircraft to disintegrate in flight. Boeing's contention that the sole cause of the accident was abnormally severe clear air turbulence was not supported by any admissible meteorological evidence. Boeing and the district court relied solely upon the speculative conclusions of the Japanese Civil Aeronautics Board in its official Report⁸ on the investigation of the accident:

a) Results of Investigation

G-APFE was making a normal flight towards Mount Fuji till immediately before the accident *in such clear weather* that Mount Fuji could be seen from Tokyo.

The evidence provided by the aircraft wreckage, the injuries of the victims and the evidence from the colour film *suggests* that the aircraft suddenly encountered abnormally severe gust loads exceeding the design limit load . . . and disintegrated in the air in very short period of time.

Although it was impossible to forecast the existence . . . of turbulence sufficiently severe to destroy the aircraft and the investigation could not discover evidence which could verify meteorologically the existence of

⁸ Hereinafter referred to as JCAB Report.

such turbulence, it cannot be denied that turbulence *might* have become extremely severe, *if it is assumed* that a strong mountain wave system was present in the lee of Mount Fuji.

b) Probable Cause.

The probable cause of the accident is that the aircraft suddenly encountered abnormally severe turbulence . . . which imposed a gust load considerably in excess of the design limit.

Appendix 133a-134a. (Emphasis added.)

It was the position of British Airways that the meteorological conditions near Mt. Fuji were normal on the day of the accident and in the event that some turbulence did exist, it was not of such severity as to break up a Boeing 707 in normal flight in clear weather! Captain Thomas Nisbet, Air Safety Advisor for British Airways, testified on deposition that he had never heard of an aircraft such as a Boeing 707, or any other comparable commercial aircraft, breaking up in mid-air solely as a result of meteorological conditions. Appendix 354a. Ernest Chambers, the British Airways meteorologist who was familiar with the meteorological conditions at the time and place of the accident, testified on deposition:

- Q. Do you recall whether you agreed or disagreed with the final Japanese Report as pertaining to meteorology?
- A. Yes, I recall that I was very unhappy about the Report as such.
- Q. Did you express that unhappiness to the Japanese at any time prior to or after the Report was issued?
- A. I don't think I expressed it officially.

Q. Unofficially did you?

A. Unofficially.

Q. In what form?

A. *I merely said I could not believe it.*

* * *

Q. What aspects could you not believe from the Japanese Report?

A. Simply the magnitude of the sudden onset of turbulence.

Q. What did you believe with regard to the magnitude; less or more than the Japanese did?

A. *I simply could not believe that it could have happened.*

Q. That what could have happened?

A. *That a gust of that magnitude could have happened, instantaneously.*

Q. *Of what magnitude?*

A. *A magnitude sufficient to break up the airplane.*

* * *

Q. Why did you not believe that a gust of that magnitude could have existed, descending Mount Fuji, at the time of the accident?

A. By my analysis of the situation there seemed to be nothing extraordinary about the flow at the time.

Q. Nothing extraordinary?

A. No.

Q. Did you ever put in writing your apparent disbelief of the Japanese conclusions regarding meteorology to BOAC or anyone else?

A. The only thing in writing that I can remember was after my initial examination of the data when I cabled back "Very severe turbulence unlikely".

Q. You cabled back from Tokyo?

A. Yes.

Deposition of Ernest Chambers, pp. 30:A-31:E. (Emphasis added.)

Although Chamber's deposition had been taken in July, 1976 in London, the transcript thereof was not available when the summary judgment motions were considered. The district court refused to await the transcript before ruling and rejected it when subsequently filed in connection with the motion for reconsideration. Appendix 20a. The Court of Appeals held that the district court had not abused its discretion in so treating the Chambers deposition. Appendix 11a; 585 F.2d at 953.

Thus, the district court erroneously *decided* the factual issue of causation, relying upon the speculative conclusions of the JCAB Report.⁹ Appendix 16a-17a.

Summary judgment is particularly inappropriate in a negligence case such as this because issues of negligence and causation are rarely so undisputed that the matter may properly be removed from the jury. 6 MOORE'S FED-

⁹ The JCAB Report and its opinions and conclusions would not be admissible at trial and certainly should not be the foundation for granting summary judgment. Fed. R. Evid. 801(e), 802, 803(8)(c); Federal Aviation Act § 701(e) (1958), 49 U.S.C. § 1441(e); Transportation Safety Act § 304(c) (1974), 49 U.S.C. § 1903(c); *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969); *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628 (3d Cir.), cert. denied, 375 U.S. 895 (1963); *Complaint of American Export Lines, Inc.*, 73 F.R.D. 454 (S.D.N.Y. 1977); *Fidelity & Casualty Co. v. Frank*, 227 F. Supp. 948 (D. Conn. 1964).

ERAL PRACTICE, ¶56.17[42] (1976); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil §2729 (1973).

As was stated by the Court of Appeals in *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973), even if the facts are undisputed in a negligence case, summary judgment is inappropriate if all "reasonable men . . . would not draw the inference and conclusion therefrom of non-negligence." 479 F.2d at 660.

The Court of Appeals evidently was so persuaded by Boeing's argument that the aircraft was caused to disintegrate in level flight due to abnormally severe clear air turbulence, that it stated that even if the fin attachment fitting were defective and caused the fin to separate in flight, there would have been an accident anyway due to the turbulence which the aircraft encountered.

If the CAT exceeded the design strength of the plane, there would have been a major air disaster whether or not the fin attachment fitting was defective.

Appendix 9a-10a; 585 F.2d at 952.

Therefore, the court held, a factual dispute regarding the defective fitting was immaterial. Appendix 10a; 585 F.2d at 952-3. The court improperly determined that if there existed abnormally severe clear air turbulence exceeding the design strength of the aircraft, any negligence of Boeing with respect to the defective fin attachment fitting was irrelevant. In any event, a determination of whether the accident would have occurred except for the negligence of Boeing, was an issue for a jury to decide.

Finally, however, the basic error of the courts below was in *deciding* the factual issues in dispute in the face of conflicting evidence and inferences to be drawn therefrom which could support either theory of the accident.

A jury, upon the basis of a full evidentiary record, and not the courts below, should make the determination.

3. Summary judgment is inappropriate where discovery proceedings as to the issues involved are in process and incomplete.

The party opposing a summary judgment motion must be given the opportunity to conduct discovery relevant to the claimed factual dispute and necessary to defeat the motion. It is manifestly improper for a court to apply the drastic remedy of summary judgment where the opposing party has not been afforded such opportunity. *First National Bank v. Cities Services Co.*, 391 U.S. 253 (1968).

In this regard, Professor Moore has stated:

"[A]ccess to proof is a factor to be considered: (a) in ruling on a motion for summary judgment; or (b) in determining whether an opposing party has shown sufficient reasons why he cannot then present facts essential to justify his opposition so that, pursuant to Rule 56(f), 'the court may refuse the application for judgment or may order a continuance . . .'" (Emphasis added.)

6 MOORE'S FEDERAL PRACTICE ¶56.15[5] at 56-558 (1976).

At the time summary judgment dismissing the action was granted in this case, there was significant and substantial outstanding uncompleted discovery with respect to the claimed factual dispute as to liability and causation. The scheduled depositions of Boeing personnel had not yet been taken, a Petition for Letters Rogatory and a Commission to take depositions in Japan of witnesses to the crash and of the Japanese government investigators was pending in the district court, there was outstanding a request by petitioner for the production of certain Boeing documents and

the British Airways' depositions were not completed. All of this was known to the district court. In fact, even before the motion for summary judgment was orally argued, petitioner asked the court to continue further the trial date so that the outstanding discovery could be completed! Appendix 37a-38a.

In spite of this significant uncompleted discovery, the district court granted summary judgment dismissing the action in its entirety. On a motion for reconsideration, the court further held that there was no need for further discovery with respect to the claimed factual dispute since petitioner had initiated the "process of judicial review" with the filing of a motion for partial summary judgment and had, thus, apparently waived its right and the need for further discovery as to all claims. Appendix 19a.

Even if the district court doubted that additional discovery would produce sufficient evidence of the claimed factual dispute to defeat Boeing's motion for summary judgment, petitioner should have been afforded the opportunity to complete additional discovery to obtain the evidence necessary to oppose Boeing's motion. Petitioner did not concede that it was impossible to improve the record with respect to the claimed factual dispute. In fact, counsel for petitioner emphasized at oral argument before the district court on the summary judgment motions that the record could be improved with additional discovery.

The plane broke up in the air, the fin failed first, and we believe that the next statement, i.e. that the fatigue cracks in the terminal fittings caused this fin to fall off the aircraft and failed first is admitted by the Boeing Company in their sworn testimony in prior litigation, and we further submit, Your Honor, that this one

aspect will be further substantiated in the depositions of these [Boeing] people in this litigation if there is any further need to substantiate it.

Appendix 36a-37a.

It is improper for a court to grant summary judgment at a time when the facts have not been fully developed. *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1145 (5th Cir.), cert. denied, 414 U.S. 1116 (1973). If the opposing party is not allowed to develop through discovery the evidence which could serve to establish the claimed factual dispute, clearly the facts have not been fully developed and the granting of summary judgment is improper.

- 4. A court has no discretion to grant summary judgment where the standards set forth in Rule 56(c) have not been met regardless of the technical failure to file an affidavit pursuant to Rule 56(f).**

Petitioner argued in the court below that the grant of summary judgment at a time when there was significant outstanding and incomplete discovery constituted reversible error. The court failed to address the issue, holding instead that because petitioner had not filed an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, requesting a continuance, further discovery was not at issue.

The court stated:

At no point did it [petitioner] request the district court to stay consideration of the summary judgment motions pending completion of discovery. . . . The airline can hardly argue at this late date that the district court abused its discretion in ruling on the summary judgment motion in light of the fact that

BOAC itself failed to pursue the procedural remedy which the Federal Rules so clearly provided.

585 F.2d at 954; Appendix 13a-14a. (Emphasis added.)

Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FED. R. CIV. P. 56(f).

Rule 56(f) is designed to allow a party opposing a motion for summary judgment to request a continuance or denial of a summary judgment motion where the party finds itself unable to present the necessary evidence to defeat summary judgment because of inadequate or incomplete discovery. It is designed to protect the party opposing a motion for summary judgment and, therefore, it is incongruous that it should be relied upon to prevent a party from developing, through completion of pending discovery, evidence that would defeat a summary judgment motion.

A court can grant summary judgment only when the standards set forth in Rule 56(c) have been met and *must deny* the motion if there is a possibility that an issue remains for trial. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil §2728 (1973). Rule 56(f) does not alter, in any way, the standards set forth in subdivision (c) of Rule 56:

The district court has no discretion to enlarge its power to grant summary judgment beyond the limits

prescribed by the rule. It may grant a Rule 56 motion only when the test set forth therein has been met and must deny the motion as long as an issue remains for trial.

WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil §2728 at 552 (1973).

Thus, it is clear that the district court had no discretion to enter summary judgment when it was not warranted under Rule 56(c), regardless of whether petitioner had filed a technical affidavit pursuant to subdivision (f) of the Rule with respect to the incomplete discovery proceedings. If the completion of the outstanding discovery was required to fully develop the facts or to allow petitioner the opportunity to improve the record, the district court had no discretion to enter summary judgment. Rule 56(f) cannot be used to punish a party who fails to file a technical affidavit under Rule 56(f) where the district court is fully aware through other means that there is substantial and incomplete discovery still to be had. As was stated in *Whitaker v. Coleman*, 115 F.2d 305 (5th Cir. 1941):

Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. Rule 56 is carefully drawn to effectuate this purpose.

115 F.2d at 307.

It is clear from the decision of the Court of Appeals that it never properly considered whether it was error for the district court to grant summary judgment in a negligence action where there was substantial uncompleted discovery with respect to the claimed factual dispute. This was improper, as a matter of law, since the Court of Appeals was required, in reviewing the district court's order granting summary judgment, to apply the same considerations as the district court in determining whether the case was in the proper posture for the granting of summary judgment. *Pacific Fruit Express Co. v. Akron, C. & Y.R. Co.*, 524 F.2d 1025 (9th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976). The Court of Appeals, however, failed to consider whether the state of the record was adequate for summary judgment determination in light of the sharply disputed factual issues involved and the substantial uncompleted discovery proceedings, of which the district court was fully apprised, or if petitioner should have been given the opportunity to improve the record with respect to the opposition to the Boeing motion through additional discovery, because petitioner did not file an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure.

Not only was the record inadequate for summary judgment adjudication in this strict tort liability, negligence and breach of warranty action, but petitioner should have been allowed to seek to improve the record regardless of its failure to file an affidavit pursuant to Rule 56(f).

It is clear that the Court of Appeals ignored the state of the record at the time summary judgment was entered because of petitioner's failure to file a 56(f) affidavit and this has resulted in petitioner being deprived of its right to a trial by jury.

5. **The burden of the moving party cannot be satisfied where there is the possibility that further discovery could establish genuine issues of material fact sufficient to defeat the summary judgment motion.**

Summary judgment is a drastic remedy and, therefore, it should be invoked cautiously so as not to deprive any litigants of the right to a trial where there exists a dispute of facts between the parties. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962).

It is the burden of the movant to establish without dispute that it is entitled to summary judgment.

[W]e have repeatedly emphasized that summary judgment is an extreme remedy, not to be employed unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recovery under any discernible circumstances

Lyons v. Board of Education, 523 F.2d 340, 347 (8th Cir. 1975).

The moving party has "the burden of clearly establishing the lack of any triable factual issue on a record that is adequate for a decision of the legal question presented." 6 MOORE'S FEDERAL PRACTICE ¶56.15[6] at 56-601, citing *Askew v. Hargrave*, 401 U.S. 476 (1971). It cannot be said that the record is adequate for summary judgment determination where there is significant and substantial outstanding discovery relating to material facts bearing on the very issues before the court.

6. **The district court mistakenly concluded that because both British Airways and Boeing moved for summary judgment, a judgment in favor of one was required.**

Cross-motions for summary judgment do not justify the granting of either motion unless one of the parties is en-

titled to summary judgment as a matter of law. *Jacobson v. Maryland Casualty Co.*, 336 F.2d 72 (8th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); *Eagle v. Louisiana & Southern Life Insurance Co.*, 464 F.2d 607 (10th Cir. 1972). As was stated in *Browner v. Pearl Assurance Co.*, 267 F.2d 45 (9th Cir. 1958).

[T]his Court is again confronted with the confusion which follows the filing of motions for summary judgment by plaintiff and defendant, respectively. Again it is reiterated that such a situation does not parallel that where both parties file motions for directed verdict. In the latter instance, each party is held to agree that there is no disputed question of fact and that the case is to be decided on the principles of law. In contrast, by definition, a summary judgment cannot be granted if there be a disputed question of material fact. *This determination does not depend upon what either or both parties may have thought about the matter.*

267 F.2d at 46. (Emphasis added.)

The district court disregarded the above principles in ruling on the motions before it. British Airways moved for reconsideration upon the ground that the court had erred in granting summary judgment dismissing the action in that deposition and discovery proceedings were still uncompleted and the full transcripts of certain completed depositions were not before the court, matters disregarded by the court when the summary judgment was granted. The district court denied the motion and stated that British Airways had initiated the "process of judicial review",¹⁰ therefore, apparently obviating any consideration by the court of whether there had been sufficient discovery by the parties at the time the motions were heard.

¹⁰ Appendix 19a.

This, of course, is incorrect as a matter of law. *Browner v. Pearl Assurance Co.*, 267 F.2d 45 (9th Cir. 1958).

The district court further demonstrated a lack of understanding that the mere filing of cross-motions for summary judgment does not eliminate or negate the presence of material issues of fact. The court erroneously stated that "the parties agree that there are no material facts in dispute."¹¹ The district court apparently based this erroneous assumption upon the fact that both parties simultaneously were arguing, in support of their respective motions, that there was no genuine issue of fact even though each had its own theory of liability and causation with regard to the accident. The fact that cross-motions for summary judgment have been filed does not establish that the parties have agreed that there are no triable issues of fact and that a trial is unnecessary, thereby empowering the district court to enter judgment as it sees fit.

Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist.

Rains v. Cascade Industries, Inc., 402 F.2d 241, 245 (3d Cir. 1968).¹²

¹¹ Appendix 16a.

¹² *Accord*, *Pioneer Nat'l Title Ins. Co. v. American Cas. Co.*, 459 F.2d 963 (5th Cir. 1972); *Le-Ron Television, Inc. v. D. H. Overmyer Leasing Co.*, 401 F.2d 689 (4th Cir. 1968), *cert. denied*, 393 U.S. 1083 (1969); *Union Ins. Soc. of Canton, Ltd. v. William Gluckin & Co.*, 353 F.2d 946 (2d Cir. 1965); *Jacobson v. Maryland Cas. Co.*, 336 F.2d 72 (8th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, as prayed herein.

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Certificate of Service

I hereby certify that I have, this 5th day of February, 1979, served the foregoing Petition for a Writ of Certiorary to the United States Court of Appeals for the Ninth Circuit upon respondent by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid to:

Perkins, Cole, Stone, Olsen & Williams
 1900 Washington Building
 Seattle, Washington 98101
 Counsel for Respondent.

February 5, 1979

 George N. Tompkins, Jr.
 Counsel for Petitioner